

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY MERCER

Claimant

VS.

MARTIN'S PAVING

Respondent

AND

**KANSAS WORKERS COMPENSATION
INSURANCE FUND**

Docket No. 1,029,358

ORDER

The Kansas Workers Compensation Fund (Fund) requested review of the August 15, 2006, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found that claimant suffered a compensable work injury on May 18, 2006. Respondent and its insurance carrier (respondent) was ordered to provide a list of three physicians to claimant from which claimant shall select one to be the authorized treating physician. Respondent was also ordered to pay all outstanding and related medical expenses incurred to date. Temporary total disability compensation was ordered to be paid at the rate of \$266.68 per week from July 24, 2006, and continuing until claimant is released to substantial and gainful employment. The ALJ also found that for preliminary hearing purposes, a sufficient evidentiary showing was made indicating that respondent cannot be located and is uninsured. Accordingly, the ALJ ordered the Fund to pay all benefits awarded.

The Fund asserts that claimant has the burden of showing that respondent is uninsured and is financially unable to pay compensation, or that respondent cannot be located. The Fund contends that claimant failed to present sufficient evidence on this issue to the court and requests the Board reverse the ALJ's order requiring it to pay all benefits awarded. The Fund further argues that the ALJ's award of temporary total disability benefits should be reversed because claimant is capable of working.

Claimant argues that since he cannot locate respondent, he has appropriately followed the provisions of K.S.A. 44-532a(a) in impleading the Fund. Claimant contends it would be overly burdensome to require him to engage in extensive searching and investigation under these circumstances. Claimant further states that he has restrictions based on a work-related injury and is unable to find a job because of those restrictions. Accordingly, he argues that he meets the requirements of being temporarily totally disabled. Claimant requests that the Order entered by the ALJ be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant began work for respondent as a laborer the end of April or first of May 2006. On May 18, 2006, he apparently suffered heat exhaustion and fell, injuring his neck and back. He was taken home after his fall by his girlfriend, who also worked for respondent. Claimant later visited with his supervisor and told him he would not be going to work the next day because he was taking his son to the doctor. His supervisor then advised him that his employment with respondent was terminated.

Claimant saw his personal physician on May 24, 2006. He returned to the doctor on July 24, 2006, and received a restriction slip that stated: "OK to return to work with following restrictions. No lifting > 25#. Change positions frequently"¹ Claimant admits that he has been applying for jobs since he was terminated by respondent on May 18 because he has no income. He admitted that he thinks he is able to work but has been unable to find a job.

Claimant testified that he heard of the job opening with respondent from his girlfriend. His only contact at respondent was with his supervisor, Stretch, whose last name he did not know. He met with Stretch in the parking lot of a motel, which was where all the company's equipment was parked. He was paid \$80 a day, in cash, regardless of the number of hours worked. He thought respondent was a Texas company but did not know how long it had been in business. Claimant's last contact with respondent was the day he was injured and terminated.

The attorney for the Fund advised the ALJ that he had written respondent at the address of the motel but received no response to that letter. He contacted the motel and was told that Mr. Martin, respondent's owner, was residing in one of the motel's rooms but was not there at that time. Claimant's attorney also indicated that he has not been able to communicate with respondent concerning a request for a wage statement.

¹ P.H. Trans., Cl. Ex. 1 at 1

The Fund argues that K.S.A. 44-532a(a) places the burden on claimant to prove his employer is both uninsured and financially unable to pay compensation or cannot be located. On this issue, claimant states in its brief to the Board that

the evidence is very clear that this employer is transitory in nature, operating out of a hotel. It has no know[n] fixed office, location or address. As the Fund's own counsel acknowledges, he is unaware of any address of fixed location of Martin Paving and he didn't know "the whereabouts of Mr. Martin." The record confirms that Mr. Martin nor any other person from Martin Paving voluntarily responded to Mr. Nodgaard's correspondence nor his phone calls. The Fund argues that the claimant must prove that the employer had no insurance **and** the employer is financially unable to pay the compensation due. However, the provisions of K.S.A. [44-532a(a)] are not so limiting. It goes on to state **"or such employer cannot be located and required to pay such compensation."** As the claimant cannot locate Martin Paving, or presumably its principal Mr. Martin, and cannot require them to pay, claimant has appropriately implicated the provisions of K.S.A. [44-532a(a)] in impleading the Workers Compensation Fund. The Fund's argument that the claimant has not established a financial inability to pay compensation is not an adequate defense as that is not the only condition contained in K.S.A. [44-532a(a)]. The claimant has established in uncontested evidence that Martin Paving has no fixed address, is not responding to correspondence, nor pleadings nor Notices of the Court.²

I find that claimant has met his burden in this regard.

Furthermore, as to the issue of financial ability, the Fund acknowledges that respondent has no insurance carrier listed with the Division of Workers Compensation. As for which party bears the burden of proving that respondent is financially unable to pay compensation, the Kansas Court of Appeals has specifically held "that the claimant does not bear that burden."³ Accordingly, the ALJ's assessment of liability against the Fund is affirmed.

Turning to the question of temporary total disability, it should first be noted that the Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.⁴ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and

² Appellee's Brief on Appeal filed September 25, 2006, at 2.

³ *Helms v. Pendergast*, 21 Kan. App. 2d 303, 313, 899 P.2d 501 (1995).

⁴ K.S.A. 2005 Supp. 44-551.

(4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁵

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue of whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁶

An ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the appeal.⁷ Accordingly, respondent's appeal is dismissed.

The respondent may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2). That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated August 15, 2006, is affirmed as to the issue of the Kansas Workers Compensation Fund's liability for preliminary benefits, and the Fund's appeal of the award of temporary total disability benefits to claimant is dismissed.

IT IS SO ORDERED.

⁵ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 673-74, 994 P.2d 641 (1999).

⁶ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977); see also *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

⁷ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

Dated this _____ day of October, 2006.

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
John C. Nodgaard, Attorney for Workers Compensation Fund
Nelsonna Potts Barnes, Administrative Law Judge